STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 16, 2010
v	No. 281173 Wayne Circuit Court
JASON ROBERT SPICER, Defendant-Appellant.	LC No. 06-009064-01

Before: DAVIS, P.J., and WHITBECK and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for carrying a concealed weapon in a motor vehicle (CCW), MCL 750.227(2), third-degree fleeing and eluding a police officer, MCL 257.602a(3)(a), assaulting, battering, obstructing or opposing a police officer performing his duties (resisting arrest), MCL 750.81d, possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to concurrent terms of three years' probation for defendant's carrying a concealed weapon in a motor vehicle, third-degree fleeing and eluding a police officer, resisting arrest, and possession with intent to deliver less than 50 grams of cocaine convictions, to be served consecutively to two years' imprisonment for his felony-firearm conviction. We affirm.

Defendant's charges arose out of an encounter between himself and Detroit police officers on the night of July 25, 2006. The jury was given differing stories about exactly what transpired.

Defendant was the driver of a green Ford Taurus, and he had with him two passengers, one of whom was Dewann Riggs. According to defendant and Riggs, the other passenger, seated in front, was Jermaine McSween; however, Marvin Betts was arrested and prosecuted in connection with this matter.[1] Detroit Police Officers Ryan Connor and Joseph Dabliz initiated a

[1] According to defendant, and at a post-trial evidentiary hearing, Betts himself, Betts was arrested and prosecuted in this matter as a result of mistaken identity. According to defendant, McSween was deceased at the time of trial. Although Betts testified that he was not present, he (continued…)

traffic stop of the Taurus after the Taurus pulled out of a gas station. According to the officers, defendant was not wearing a seat belt, but according to defendant, he and his passengers were wearing seat belts because they had noticed the police vehicle. Defendant immediately complied with the traffic stop. According to the officers, defendant turned off the car and handed the officers the keys; according to defendant, he was not asked for his keys and did not turn off the car, but he handed officers his license. The officers testified that they noticed the back-seat passenger, Riggs, acting suspiciously, and they ordered him out of the car, whereupon they noticed a baggie of what appeared to be crack cocaine on the floor of the back seat.

When the officers asked defendant for the vehicle's paperwork, defendant asked McSween to "get it," which, according to defendant, was a request for that paperwork. However, McSween instead produced a gun. Defendant testified that he did not have any prior knowledge that McSween was armed, and he panicked upon finding himself between McSween and a police officer both pointing guns at each other. In any event, defendant drove the car away and a chase occurred at a speed of about 50 miles an hour. During the chase, the front passenger got out and fled on foot; officers later found Betts in the neighborhood and assumed Betts to have been the front passenger.

After the Taurus came to a stop, defendant got out. According to officers, defendant fled on foot, dropping a baggie on the way. The officers further testified that defendant was "not very fast," and that defendant struggled with officers when the officers caught him. The officers testified that when they recovered the baggie, it contained "a large quantity" of suspected crack cocaine. According to defendant, he was disabled and unable to run, and he made no attempt to do so. At trial, defendant explained that he had been shot in April of 2000, and sustained nerve damage to his left side, which required several surgical procedures. He further testified that at the conclusion of the chase, the officers ran up to him and repeatedly punched him in the face. A photo of defendant's bruised face taken at the police station was admitted. A search of the car revealed a revolver on the front passenger seat, three bags of cocaine totaling about 227 grams, and a small bag of marijuana in the trunk. Defendant, a college graduate with no prior criminal record, denied possessing any of the drugs and denied any knowledge of the drugs in the car.

Defendant generally contended that the police fabricated much of their testimony. However, the jury clearly found that the officers' testimony was more credible. Issues of credibility are for the jury. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1988). This Court is not permitted to weigh the evidence or evaluate witnesses' credibility. *People v Cain*, 238 Mich App 95, 118-119; 605 NW2d 28 (1999). As we discuss herein, we are not presented with any compelling reason why we should invade the jury's role as trier of fact, nor are we persuaded that the jury was unable to carry out its role properly.

(…continued)

nevertheless pleaded no contest to a felony-firearm charge pursuant to a plea agreement presented to him by his attorney, which operated to dispose of the charges relating to this case, along with additional unrelated charges. According to Betts, he accepted the plea agreement because he was afraid that he would be convicted for both his involvement in this incident and the unrelated case, and because his attorney advised him that the agreement was the best he could obtain for Betts.

On appeal, defendant first argues that the trial court erred by permitting Betts to invoke his Fifth Amendment right against self-incrimination and failing to require Betts to testify, in alleged violation of defendant's Sixth Amendment right to compulsory process. We disagree. Constitutional issues present questions of law, which we review de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997). We review a trial court's decision regarding compulsory process for an abuse of discretion. *People v Yeoman*, 218 Mich App 406, 413; 554 NW2d 577 (1996).

The Sixth Amendment gives criminal defendants a fundamental, although not absolute, right to present witnesses in their defense under the Compulsory Process clause. *People v McFall*, 224 Mich App 403, 407-408; 569 NW2d 828 (1997). That right depends on some demonstration that the proposed witness's testimony would be material and favorable to the defense, and it must be balanced against the competing interests of the fair and efficient administration of justice, and the integrity of the adversarial process. *Id*. at 408-410. The Fifth Amendment privilege against self-incrimination protects a witness from being compelled to disclose "testimony having even a possible tendency to incriminate," an even where a defendant makes a request, a prosecutor has no duty to grant a witness "immunity so he could testify for [the] defendant." *People v Lawton*, 196 Mich App 341, 346; 482 NW2d 810 (1992). Questioning "need not be directly incriminating for the privilege to attach," and ""the validity of the privilege is not dependent on whether the authorities already have evidence against a person." *People v Gearns*, 457 Mich 170, 200 n 17; 577 NW2d 422 (1998). An "attorney may not call a witness knowing that he will claim a valid privilege not to testify," and even if a witness invokes an invalid privilege, it would be error for the trial court to order the witness to testify. *Id*. at 193, 203.

Betts and his attorney unequivocally indicated that Betts would not answer any questions posed to him on the basis of his Fifth Amendment protection against self-incrimination. The trial court would not have abused its discretion in concluding, on that basis alone, that it could not compel Betts to testify, particularly given the trial court's correct observation that Betts may have knowledge of something else no one else knew about that would have been incriminating. Furthermore, the time for Betts to appeal his plea had not yet run: he was still within the 12-month period for filing an application for delayed leave to appeal pursuant to MCR 7.205(F)(3)(b). We find no error in the trial court's conclusion that Betts's assertion of his Fifth Amendment privilege was valid. In any event, when Betts later did reveal the substance of what his testimony would have been, it was revealed to be merely cumulative of what three other witnesses, including defendant, said: that the front-seat passenger was McSween, not Betts. Thus, Betts's testimony might have been objectionable as cumulative, MRE 403, and he could not have shed any light on any other aspect of defendant's defense.[2]

[2] We also note that, because Betts did not present any evidence and would not have been a witness against defendant, defendant was not denied his Sixth Amendment right to confront a witness against him by virtue of Betts not testifying.

Defendant next argues that the trial court improperly excluded medical records that, according to defendant, would have supported his theory that he could not have run away from the police. We disagree.

This Court reviews a trial court's decision regarding the admission or exclusion of evidence for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). The trial court excluded defendant's medical records from December of 2000, when he obtained medical treatment for a gunshot injury. The trial court concluded that those records were "too remote in time," and although those records showed what defendant's medical conditions were like six years ago, they did not tend to show whether defendant was capable of running at the time of the incident. The trial court did *not* preclude defendant from arguing that he was medically unable to run away from the police officers at the time of the indent, nor did the trial court preclude defendant from presenting medical or expert evidence to that effect. And indeed, defendant did so argue.

The trial court did not step outside the range of principled outcomes by concluding that the relevant inquiry was defendant's medical condition on July 25, 2006, not in December of 2000. Five-year-old medical records may or may not be reflective of a person's current medical condition. Furthermore, MCL 750.81d does not preclude a conviction for resisting arrest where the defendant is unable to run away. Rather, MCL 750.81d provides that a defendant can be convicted if the prosecution proves that the defendant assaulted, battered or resisted a police officer. Even if the trial court had admitted defendant's medical records and the jury found credible defendant's claim that he was unable to run, defendant could have been convicted of resisting arrest on the basis of the a finding that defendant punched Connor or resisted Connor when Connor attempted to handcuff defendant. The trial court reasonably concluded that the old medical records were not relevant, either because they did not shed light on defendant's present medical condition or because defendant's ability to run away was not significant to the charged offense. And because defendant actually did present evidence that he could not run away, he was not prevented from presenting his defense. *In re Hawley*, *supra* at 511.

Defendant next argues that the trial court improperly precluded defense counsel from questioning a witness regarding whether defendant owned the firearm that was recovered from the Taurus following defendant's arrest. We disagree. Ownership of a firearm is not an element of MCL 750.227(2) or MCL 750.227b(1). But in any event, the jury was informed that the firearm was "a stolen gun out of another jurisdiction" and was registered to a person in Oakland County. Thus, the jury was aware that defendant did not actually own the gun.

Defendant next argues that MCL 750.81d is void for vagueness, both because the felony information in this case failed to provide defendant with sufficient notice regarding the nature of the crime with which he was charged, and because the text of the statute does not set forth an element stating the mens rea that the prosecution must prove to convict a defendant of resisting arrest. We disagree.

The issue of whether a statute is void for vagueness presents a question of law that this Court reviews de novo. *People v Beam*, 244 Mich App 103, 105; 624 NW2d 764 (2000). "A statute may be challenged for vagueness on three grounds: (1) it does not provide fair notice of the conduct proscribed; (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed; (3) its coverage is overbroad and impinges on

First Amendment freedoms." *People v Tombs*, 260 Mich App 201, 218; 679 NW2d 77 (2003). Defendant does not assert that the statute is overbroad to the extent that it violates freedoms protected by the First Amendment so we consider the issue "in light of the facts of the case at hand." *Id*. at 218. "A defendant has standing to raise a vagueness challenge to a statute only if the statute is vague as applied to his conduct." *People v Cavaiani*, 172 Mich App 706, 714; 432 NW2d 409 (1988).

MCR 6.112 provides, in pertinent part:

> **(D) Information; Nature and Contents; Attachments.** The information must set forth the substance of the accusation against the defendant and the name, statutory citation, and penalty of the offense allegedly committed.
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> *** * ***
>
> **(E) Bill of Particulars.** The court, on motion, may order the prosecutor to provide the defendant a bill of particulars describing the essential facts of the alleged offense.
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> *** * ***
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> **(G) Harmless Error.** Absent a timely objection and a showing of prejudice, a court may not dismiss a information or reverse a conviction because of an untimely filing or because of an incorrectly cited statute or a variance between the information and proof regarding time, place, the manner in which the offense was committed, or other factual detail relating to the alleged offense. This provision does not apply to the untimely filing of a notice of intent to seek an enhanced sentence.

The felony information in this case alleged, in relevant part:

> **COUNT 7 DEFENDANT(S) (01, 02):** POLICE OFFICER – ASSAULTING/RESISTING/OBSTRUCTING Did assault, batter, wound, resist, obstruct, oppose, or endanger Ryan Connor, a police officer of Detroit Police Department that the defendant knew or had reason to know was performing his or her duties, contrary to MCL 750.81d(1). [750.81D1]
>
> FELONY: 2 Years and/or $2,000.00

The Felony Information identified defendant as "Defendant 01," indicated that the date of the offense was July 25, 2006, and identified the complaining witness as Connor.

Assuming that defendant's attack on the substance of the felony information has bearing on the issue of whether MCL 750.81d is void for vagueness, we observe that if it was "impossible for [defendant] to prepare a defense to the charge as alleged[,]" defendant should have requested a bill of particulars pursuant to MCR 6.112(E) describing facts such as the duty Connor was performing when defendant assaulted him, and supporting the charge that defendant knew or had reason to know that Connor was performing his duties. MCR 6.112(E). Here,

defendant did not request a bill of particulars, and, defendant's argument that there was "absolutely no notice to [defendant] of what he is alleged to have done" is neither credible nor supported by the defenses that he actually asserted at trial. The felony information identified the substance of the accusation and the name, statutory citation and penalty of the offense allegedly committed, so the resisting arrest charge was properly alleged in the felony information. MCR 6.112(D). Because defendant neither objected nor is able to show prejudice relating to the alleged lack of factual detail in the felony information as it relates to defendant's resisting arrest charge, defendant's argument fails. MCR 6.112(G).

As to defendant's mens rea argument, the record does not demonstrate that the trial court instructed the jury that it could convict defendant if it found that defendant was merely negligent, or that the jury convicted defendant of resisting arrest on a finding that defendant was merely negligent, or that the trial court presumed that defendant had the requisite mens rea for resisting arrest and directed the jury that the element had been established as a matter of law. Moreover, the phrase "has reason to know" does not allow a conviction on the basis of constructive knowledge. *People v Nichols*, 262 Mich App 408, 413-414; 686 NW2d 502 (2004). Finally, defendant conceded that he was aware that he had been involved in a traffic stop initiated by a uniformed police officer who was working in his capacity as a police officer at the time. Because of defendant's actual knowledge, MCL 750.81d is not vague when applied to defendant's conduct. *Cavaiani, supra* at 714. Accordingly, we conclude that defendant had failed to establish that MCL 750.81d is void for vagueness.

Defendant next argues that the trial court erred when it failed to sua sponte instruct the jury regarding intent, CJI2d 4.16,[3] and impeachment by prior inconsistent statement, CJI2d 4.5,[4] and further erred when it failed to read defendant's theory of the case, as requested. We disagree. Defendant fails to explain how the absence of either instruction affected the outcome of the trial.

A trial court's jury instructions are generally adequate if "they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001). The trial court instructed the jury as to the drug and firearm possession charges that, "It is not enough if the defendant merely knew about the handgun and/or cocaine; the defendant possessed the handgun and/or cocaine only if he had control of it or the right to control it either alone or together with someone else." And the trial court instructed the jury as to fleeing and eluding that prosecution had the burden of proving beyond a reasonable doubt that, among other elements, defendant knew that a uniformed police officer had ordered him to stop and that he refused to do so. Because the trial court adequately instructed the jury regarding the element of intent relating to the charged crimes, the trial court did not err in failing

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[3] In relevant part, "The defendant's intent may be proved by what [he/she] said, what [he/she] did, how [he/she] did it, or by any other facts and circumstances in evidence."

[4] In relevant part, "If you believe that a witness previously made a statement inconsistent with [his/her] testimony at this trial, the only purpose for which that earlier statement can be considered by you is whether the witness testified truthfully in court. The earlier statement is not evidence that what the witness said earlier is true."

to sua sponte instruct the jury regarding the definition of intent. *Aldrich, supra* at 124-125; *People v Maynor*, 470 Mich 289, 296; 683 NW2d 565 (2004).

With respect to defendant's claim that the trial court erred in failing to instruct the jury, in the absence of a request, regarding the limited use of prior inconsistent statements used to impeach a witness, CJI2d 4.5, defendant fails to explain how this limiting instruction would have benefited him had it been given. Accordingly, because defendant cannot show that the trial court's failure to sua sponte instruct the jury regarding intent or the limited use of a prior inconsistent statement used to impeach a witness constituted plain error affecting his substantial rights, his argument fails.

Defendant next contends that the trial court was required to read his theory of the case, and it erred when it declined to do so. Generally, the trial court must read a defendant's theory of the case if the evidence supports the statement of the theory. *People v Hoskins*, 403 Mich 95, 100; 267 NW2d 417 (1978). Defendant's theory of his case was that he committed all of the charged crimes while under duress. The trial court did not read defendant's statement of his theory of the case, but the trial court *did* instruct the jury regarding the defense of duress. The trial court specifically stated that, "The defendant is not guilty if he committed the crime under duress." In addition, we observe that defendant had a full and fair opportunity to present his theory to the case during closing argument. Thus, we conclude that the trial court did not err when it declined to read defendant's theory of the case.

Defendant next argues that the prosecutor's improper arguments during closing and rebuttal arguments denied him a fair trial. We disagree. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753; 597 NW2d 130 (1999). While the prosecutor did make one assertion of a fact not in evidence, we do not find that defendant was prejudiced thereby.

As a general rule, "prosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor is not required to present her arguments using only the blandest terms possible. *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004). "A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence." *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). Further, a prosecutor may argue on the basis of the facts that the defendant or another witness is not worthy of belief, and may comment that other evidence presented in the case did not corroborate the defendant's testimony. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). However, a prosecutor may not argue that the defendant "must prove something or present a reasonable explanation for damaging evidence, because such an argument tends to shift the burden of proof." *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983). Reversal is not required if the prejudicial effects of the prosecutor's comments during closing argument could have been cured by a timely jury instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

During closing argument, the prosecutor argued:

> This is a college graduate from Eastern Michigan University who attempts to hide behind his so-called disability.

> Let's talk about these disabilities. I can't walk. I need a cane. Didn't have any medical testimony about that from any doctor about what his current condition was on July 25th of 2006.
>
> Where is the medical testimony in that regard that he can't walk?
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> We had some testimony that was elicited by his attorney when he was on the stand that he can't see. So now he can't see out of one eye. He can't walk and he can't see. So he is the guy you give keys to to drive a car at night.

Defendant claims that this prosecutorial argument impermissibly suggested that defendant was required, and failed, to prove that he could not walk and was partially blind, and in so arguing, improperly switched the burden of proof to defendant. However, the prosecutor properly argued that defendant's testimony was unworthy of belief, and that the other evidence in the case did not corroborate his testimony that he was unable to run and was partially blind. *Howard*, *supra* at 548. A prosecutor does not shift the burden of proof when he comments on the lack of evidence to support a defense theory. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). The trial court properly instructed the jury that the "lawyers' statements and arguments are not evidence," and jurors are presumed to have followed their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). So even if the prosecutor's comment was arguably improper, any prejudice to defendant could, and was presumed to have been, cured by a jury instruction. *Watson, supra* at 586.

During closing rebuttal argument, the prosecutor argued:

> Next question is why is he trying to get away? Several reasons why he's trying to get away. He's trying to get away because he doesn't want to get caught.
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> And our police officers, they're not honorable men, they're not to be trusted. They don't put their lives on the line everyday. They just run around, a band of roving terrorist [sic] stopping innocent people on the street and pulling them out of their cars and beating them. Can you believe that? Do you believe that's what happened?
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> Because Mr. Spicer led them on this merry chase through the neighborhood at speeds in excess of 50 miles an hour, endangering residents in the city of Detroit in a residential neighborhoods [sic], and [sic] he's to be pitied. Poor, poor, poor Mr. Spicer. The world's against him. He did none of these things himself.
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> The testimony of Officers Connor, Dabliz and Murphy proves these charges against [defendant] beyond a reasonable doubt.

Defendant contends that this component of the prosecution's closing rebuttal argument, where he referred to policemen putting "their lives on the line everyday," constituted an improper appeal to the jurors' civic duty to convict defendant. A prosecutor "should not resort to civic duty arguments that appeal to the fears and prejudices of jury members." *Bahoda*, *supra* at 282.

When viewed in context, and in light of the defense arguments and their relationship to the evidence admitted at trial, we conclude that the prosecutor's arguments did not constitute an improper appeal to the jurors' civic duty in order to secure defendant's conviction. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Rather, the prosecutor's comment during his closing rebuttal argument cautioned the jury that defendant, and not the prosecution, intended to appeal to the fears and prejudices of the jury regarding the nature of the police department and the comportment of police officers. The prosecutor did not urge the jurors to convict defendant to alleviate the general societal problems of drugs or fear of the police. Accordingly, we conclude that the prosecutor did not make an improper appeal to the jurors' civic duty to convict defendant during closing rebuttal argument. And again, the trial court properly instructed the jury that the "lawyers' statements and arguments are not evidence."

Also during closing rebuttal argument, the prosecutor asserted the following:

> And the person, one of the people that [defendant] brings in to testify I this case is Mr. Riggs, the convicted felon who pled guilty on his dope case. And the other person in the front seat of the car from testimony elicited by Mr. Alexander was Mr. Betts who pled guilty on the gun. On the gun charges.

Defendant asserts that this argument was improper because it was premised upon facts not in evidence. We agree. Betts did not plead guilty, he pleaded no contest. However, a police officer agreed with defense counsel's assertion that Betts pleaded no contest to firearms charges, and once again, the trial court properly instructed the jury that the "lawyers' statements and arguments are not evidence," and jurors are presumed to have followed their instructions. *Graves, supra* at 486. Accordingly, any prejudice to defendant could, and was presumed to have been, cured by a jury instruction. *Watson, supra* at 586. Accordingly, defendant's argument regarding prosecutorial misconduct fails.

Defendant next argues that he received the ineffective assistance of counsel. We disagree. Pursuant to this Court's order, the trial court conducted *Ginther*[5] hearings on May 23, 2008, and June 27, 2008. *People v Spicer*, unpublished order of the Court of Appeals, entered April 29, 2008 (Docket No. 281173). Following the *Ginther* hearings, the trial court concluded that defendant received the effective assistance of counsel. Accordingly, defendant's claim of ineffective assistance of counsel is preserved on appeal. *People v Plummer*, 229 Mich App 293, 308; 581 NW2d 753 (1998). An ineffective assistance of counsel claim is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's findings of fact are reviewed for clear error, and the ultimate constitutional issue arising from an ineffective assistance of counsel claim is reviewed by this Court de novo. *Id*.

An ineffective assistance of counsel claim is established only where a defendant is able to demonstrate that trial counsel's performance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). A defendant is required to overcome a strong presumption that

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[5] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

sound trial strategy motivated trial counsel's conduct. *Id*. Additionally, a defendant must demonstrate a reasonable probability that the result of the proceedings would have been different but for the counsel's errors in order to show prejudice. *Id*. Counsel's performance is "measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Moreover, "this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *Matuszak, supra* at 58.

Here, defendant argues that he received the ineffective assistance of counsel because counsel failed to request the jury instruction defining intent, and further failed to request the jury instruction relating to use of prior inconsistent statements used to impeach a witness. However, as discussed, the trial court adequately instructed the jury regarding the elements of the charged crimes, including the specific intent crimes of which defendant was convicted. Because defendant has not shown that the outcome of his trial would have been different if his counsel had requested these instructions, defendant cannot show that counsel's performance "fell below an objective standard of reasonableness," much less that he suffered prejudice. *Toma, supra* at 302-303.

Defendant next claims that he received the ineffective assistance of counsel because counsel failed to object to allegedly improper remarks by the prosecutor during closing argument. However, as discussed, only one of the prosecutor's comments was improper. Had counsel objected to most of them, the objection would likely have been overruled, and the erroneous reference to Betts's no contest plea as a guilty plea was minor and we find no prejudice therein. Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Accordingly, we conclude that defendant's ineffective assistance of counsel claims lack merit.

Defendant next argues that the cumulative effect of errors, in the aggregate, denied him a fair trial. We disagree. "This Court reviews a cumulative error argument to determine if the combination of alleged errors denied the defendant a fair trial." *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003). Where a defendant contends that the cumulative effect of multiple errors requires reversal, "the effect of the errors must be seriously prejudicial in order to warrant a finding that defendant was denied a fair trial." *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). Where there are no errors that were prejudicial to defendant, there can be no cumulative effect of errors that deny defendant a fair trial. *Ackerman*, supra at 454. Here, there were no errors that were seriously or unfairly prejudicial to defendant. Accordingly, defendant's argument fails.

Affirmed.

/s/ Alton T. Davis
/s/ William C. Whitbeck